IN THE MATTER OF a Board of Inquiry appointed pursuant to s. 38(1) of the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19

BETWEEN:

HOLLIS JOE, Complainant

ONTARIO HUMAN RIGHTS COMMISSION

and

UNIVERSITY OF TORONTO LIBRARY DEPARTMENT AND UNIVERSITY OF TORONTO PERSONNEL DEPARTMENT, Respondents

BEFORE: Randi Hammer Abramsky, Chair, Board of Inquiry

APPEARANCES:

Ms. Gerri Sanson, Counsel for the Commission
Mr. Hollis Joe, Complainant in person
Ms. Paula Rusak, Counsel for the Respondents

PLACE: Toronto, Ontario

DATES: September 20, 21, 1994 and November 4, 15 and 16, 1994.

INTERIM DECISION ON PRELIMINARY MOTIONS

This matter involves the complaint of Mr. Hollis Joe ("Complainant" or "Joe") alleging that his right to equal treatment and freedom from harassment with respect to employment has been infringed by the University of Toronto Library Department and the University of Toronto Personnel Department ("University" or "Respondents") because of his race and colour in violation of sections 4(1), 4(2) and 8 [now sections 5(1),5(2) and 9] of the Ontario *Human Rights Code*, and that the practise and procedures of the University relating to hiring, promotion and upgrading have had the effect of screening out blacks, in particular those seeking promotion, contrary to s.10 [now s. 11] of the *Code*.

The Respondent has raised a preliminary motion to dismiss and/or permanently stay this proceeding as well as a motion to quash a summons. The Human Rights Commission ("Commission") has brought a motion to amend the complaint to add allegations. This Interim Decision addresses these preliminary motions.

I. Facts

The complaint in this matter was filed on July 28, 1988, and it was served on the Respondents by mail on October 6, 1988. A number of the allegations involve promotions and events that occurred in the early and mid-1980's.

On October 20, 1988, upon receipt of the complaint, the University's Director of Labour Relations, Mr. John Parker, sent a letter to the Toronto Central Regional Manager of the Ontario Human Rights Commission requesting a meeting with the investigator to discuss the complaint when the case was assigned. (Ex. 4). This letter was referred to Investigator Gary Speranzini, who was assigned this case as well as several others relating to the University of Toronto and which were treated, generally, as a group. The meeting, as described by Mr. Speranzini, was an "introductory" meeting where he described the human rights complaint process. The substance of the complaint was not discussed.

In January 1989, the University retained counsel, Ms. Paula Rusak. In early March 1989, she telephoned Investigator Speranzini to ask for a quick fact-finding conference or face-to-face meeting to resolve the complaints. He advised her that due to his caseload, he would not be getting to these files until the Fall of 1989.

Mr. Speranzini testified that the purpose of a fact-finding conference is to narrow the issues, get more particulars and explore settlement. There is no requirement in the *Code* to conduct a fact-finding conference and the decision whether or not to have one is left to the investigating officer. Mr. Speranzini testified that in his experience fact-finding was of limited value in complex or systemic cases, especially when counsel were involved. He stated that he would not hold a fact-finding conference if there had been no response to the complaint, of which there had been none in this case. The record contains no

evidence, however, that these views were expressed to the Respondents. Rather, Mr. Speranzini acknowledged that counsel for the Respondents was left with the impression that something, although not necessarily a fact-finding conference, would take place in the Fall of 1989.

On March 15, 1989, Ms. Rusak sent Mr. Speranzini a letter confirming their conversation, repeating her request for an "early meeting and a rapid resolution to these Complaints..." (Ex. 5) The letter also made a general request for "further particulars." No additional particulars were provided then or at any time thereafter.

Nothing happened in the Fall of 1989 or afterward until the Fall of 1991, when the file was reassigned to Human Rights Officer Francisco Pangilinan, as part of the Special Task Force assigned to address the 600+ backlog of human rights complaints. On September 5, 1991, Mr. Pangilinan telephoned Ms. Rusak to advise her of his appointment. On September 13, 1991, he wrote to her requesting a meeting to discuss his "initial findings." (Ex. 6) That meeting took place in early October 1991.

According to Mr. Pangilinan, settlement was discussed during this meeting. He testified that the University wanted to know how to deal with the files and he went through what was in the complaints to see if there was room for settlement. He testified that the University was adamant that there had been no discrimination, and that he left it with the University to get back to him if it wanted to discuss settlement further. He

received no further response from the University. At the time of this meeting, Mr. Pangilinan had met with the complainant but had not interviewed anyone else, nor had he reviewed any documents. There had been no fact-finding and no conciliation, and he acknowledged that he was not in a position to assess the merits of the case. Also at that meeting, the subject of racial epithets directed at the complainant on the University's computer system in 1991 was discussed.

After this meeting, nothing more occurred until mid-August 1992, when the file was again reassigned to Human Rights Officer Lynn-Beth Sutton, who proceeded to do a full investigation. She requested documentation and information from the University, and much of it, although not all, was provided. (Exs. 10,11). In the late Fall of 1992, the investigator interviewed a number of witnesses. No fact-finding conference or other face-to-face meeting took place. There is no evidence that the Respondent did not co-operate with the investigation.

According to Ms. Lisa Raftis, Manager, Personnel Services, University of Toronto Library Department, who worked with investigator Sutton during the investigation, there was no inquiry by Ms. Sutton regarding any prejudice that the University might have suffered by the delays in the filing or investigation of the case. She testified that a number of the individuals who had been identified in the complaint have retired (Mr. Valinska, Mrs. Refell, Mr. Parker), a number have left the University's employ (Mr. Bonin, Mr. MacKenzie, and Mr. Fletcher), and several are still employed by the University (Mr.

Singh, Ms. Langlands, and Mr. Toyanaka). One individual, Mr. Bonin, currently resides in Quebec. She further testified that she had made a few recent inquiries prior to the hearing in this matter, but she had not followed up with some of the named individuals since the investigation in 1992. She testified that she recently spoke to Mr. Valinska, one of Mr. Joe's supervisors whom he alleges was involved in "incidents of harassment" in 1986, who told her that he could not remember anything from so long ago.

The University conducted its own investigation in 1989, interviewing a number of witnesses and recording their recollections. Exactly who was interviewed was not established. Ms. Raftis testified, however, that even in 1988 when the complaint was received, the University could not reconstruct the promotions or upgrading requests alleged to be discriminatory in the complaint, dating back to the early and mid-1980's. She testified that there are approximately 20 to 30 job postings per year, and the University did not maintain records of the racial or ethnic background of the applicants, nor would they know who conducted the interviews or have their interview notes. She testified that there is no central repository for interview notes and interviewers were free to discard them.

At all relevant times, the library was unionized and job posting criteria was set forth in the collective agreement, along with a non-discrimination provision, and dissatisfied employees were free to file a grievance. From 1980 to 1988, Mr. Joe filed two grievances. One involved a promotion in 1986 and the other a promotion in 1987. One of

the grievances was settled and the other was withdrawn by the Union. At some point in time, Mr. Joe became Chief Union Steward and also served as Chair of the Union's Human Rights Committee.

On October 13, 1993, approximately one year after the start of the investigation, the Case Summary was issued (Ex. 13). The Case Summary states that "[t]he events between 1980 and 1985 with respect to promotion denials, statements made at interviews and allegations of managerial intimidation relating to the complainant's attempts to apply for a supervisory position can neither be substantiated nor refuted as there is no documentation or testimonial evidence on file. The respondent manager involved left the employ of the University shortly thereafter and it appears there were no independent witnesses." (p. 3) The only promotion which is detailed is the 1986 job posting for which a grievance was filed. There were other allegations for which management "could not recall the exact incident in question." (p. 6) A matter canvassed in detail, however, was the series of abusive and racist messages directed at the complainant, and homophobic messages directed at another employee, on the University's computer system 1991, about the time that Mr. Joe became President of Local 1230 of Canadian Union of Public Employees ("CUPE). The Case Summary further states that "[c]onciliation was attempted...but proved unsuccessful." (p. 11)

On November 12, 1993, the University submitted its response to the Case Summary, raising, among other things, the issue of delay by the complainant in pursuing

his complaint under s. 34(d) (1) of the *Code*, and prejudice caused by the delay in the processing of the complaint. The University did not question the statement in the Case Summary that conciliation had been attempted.

On March 11, 1994, the parties were notified of the appointment of a Board of Inquiry. The hearing commenced, through a conference call on April 5, 1994. Full disclosure of the Commission's file was made available to the Respondents in May 1994.

II. Respondent's Motion to Dismiss/Permanently Stay the Complaint

A. Jurisdiction of the Board of Inquiry to Proceed

The Respondents assert that a number of conditions precedent to the proper establishment of a board of inquiry were not met and therefore the board lacks jurisdiction to proceed. Specifically, it submits that the Commission did not "endeavor to effect a settlement" as required by sections 33(1) and 36(1) of the *Code*, and that it did not determine or satisfy itself, as required by s. 34(1)(d) of the *Code*, that the complainant's delay in filing his claim was "incurred in good faith and [that] no substantial prejudice will result to any person affected by the delay". Because these statutory requirements were not fulfilled, it argues, the complaint must be dismissed.

Sections 33(1) and 36(1) of the *Code* provide, respectively, as follows:

> **Section 33. (1)** Subject to section 34, the Commission shall investigate a complaint and endeavor to effect a settlement.

> **Section 36.** (1) Where the Commission fails to effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may request the Minister to appoint a board of inquiry and refer the subject-matter of the complaint to the board.

In support of its position, the Respondents rely on *Findlay and MacKay v. Mike's Smoke & Gifts et al.* (unreported, July 5, 1993, Ont. Bd. of Inq.). In that case, the Commission had admitted that there had been no attempt to settle the case and that it did not engage the respondents in any conciliation discussions. A majority of the three-person Board of Inquiry determined that the statutory requirement that the Commission "shall .. endeavor to effect a settlement" was a condition precedent to the appointment of a board of inquiry, and, accordingly, its failure to do so required dismissal of the complaint for lack of jurisdiction.

The Respondents assert that the holding and reasoning of this case applies with equal force here where the evidence establishes that there were no settlement discussions except a *pro forma* recitation of what the complainant wanted. This, it asserts, fails to meet the statutory requirement that the Commission "endeavor to effect a settlement." Accordingly, it submits that this alone requires dismissal of the complaint.

The Respondents also assert that the Commission failed to determine and satisfy itself that the delay in the filing of this complaint was "incurred in good faith and that no substantial prejudice will result..." , as required by s. 34(1)(d). This, it contends, is also a condition precedent which was not met in this case. Section 34(1)(d) provides as follows:

> **Section 34.(1)** Where it appears to the Commission that,
> ...
> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
> the Commission may, in its discretion, decide to not deal with the complaint.

The Respondents contend that this case squarely raises the issue of the Commission's non-compliance.

In support of its position, the Respondents cite the decision of the board of inquiry in *Bhaduria v. The Toronto Board of Education* (1988), 9 C.H.R.R. D/4501 (Ont. Bd. Inq.), where Ms. Paula Knopf, sitting as a board of inquiry, discussed the impact of the enactment of s.34(1)(d) (then s. 33(1)(d)) on the applicability of the *Limitations Act* to complaints under the *Code*. The board said, in *obiter*, that the purpose of the amendment was to relieve complainants from the two-year strictures of the *Limitations Act* and open the possibility of filing of complaints. The board continued at D/4506:

> Instead, the period [to file a complaint] is unlimited except that after six months, the Commission can only proceed if it is satisfied that no substantial prejudice would result if the action is based on complaints preceding six months before the complaint is filed.

In addition, the board stated at p. D/4505 that " [w]hile the exercise of the Commission's discretion under section 33(1)(d) [now s.34(1)(d)] may be broad, it requires the

Commission to be satisfied that any delay beyond the six months was incurred in good faith and that no substantial prejudice resulted to the respondents."

The Respondents submit that in the present case there is no evidence that the Commission made any inquiry into the complainant's good faith or the prejudice to the respondents. It further asserts that this inquiry must be made before an investigation could proceed or a board of inquiry established. This inquiry, it argues, is a condition precedent to the establishment of a board of inquiry, and its absence renders the board without jurisdiction to proceed.

On a more general level, the University contends that the Human Rights Commission must follow its governing statute and cannot be allowed to ignore its statutory obligations. It cites *Ontario (Ministry of Health) v. Ontario Human Rights Commission* (1993), 105 D.L.R. (4th) 333 (Ont. Div. Ct.), where the court granted the respondent's motion to quash the appointment of a board of inquiry when the Commission appointed a board on a request for reconsideration without following the requirements set out in Section 36 of the *Code*. The court, per J. Southey, found the actions of the Commission to be "obviously contrary to the clear provisions of its constituent statute" Id. at p. 341 The court ruled that the Commission was bound by the requirements of the *Code*, citing the reasoning of Dickson, J. of the Supreme Court of Canada, in *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Association* (1978), 41 D.L.R. (3d) 6, at p. 11:

> There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest.

In response, counsel for the Commission argues that it is not for this board of inquiry to sit in judgment of the actions of the Human Rights Commission prior to the appointment of the board. It submits that the board's jurisdiction is limited, under Section 39(1) of the *Code*, "(a) to determine whether a right of the complainant under this Act has been infringed, (b) to determine who infringed the right; and (c) to decide upon an appropriate order under s. 41...." The Commission submits that the majority of boards of inquiry have followed the dissent of Member Hartman in *Findlay, supra*, and have held that any failure of the Commission to follow the requirement of Section 33 of the *Code* to "endeavor to effect a settlement" must be addressed by the courts on judicial review, not a board of inquiry. Specifically, the Commission relies on the decision of *Drummond v. Tempo Paint and Varnish Co.* (unreported, June 21, 1994, Ont. Bd. of Inq.) and *obiter* in *Narraine v. Ford Motor Company of Canada Ltd. et al.* (unreported, April 21, 1994, Ont. Bd. of Inq.)

The Commission further argues that it fully met the requirement that it "endeavor to settlement the complaint" by the actions of Human Rights Officer Pangilinan who discussed settlement with the respondents. It points out that the Respondents were adamant that no discrimination took place and that it was left up to them to get back to

Mr. Pangilinan if they wanted to discuss settlement further. It argues that the Respondents did not do so and that the Commission justifiably presumed that further settlement efforts would be futile. In support it cites *Siung and Agyeman v. Geiger International Ltd. et al.*(unreported, July 6, 1993, Ont. Bd. of Inq.)

The Commission also submits that there is no evidence in the record that the Commission failed to satisfy itself of the complainants' good faith in filing his complaint and the prejudice as set forth in Section 34 (1)(d). It contends that the Commission's act of proceeding with the investigation and the appointment of a board of inquiry demonstrates that it exercised its discretion. It cites *Guthro v. Westinghouse Canada Inc.* (1991), 15 C.H.R.R. D/388 at p. D/390 (Ont. Bd. Inq.), where the board determined that the appointment of a board of inquiry meant that "[o]bviously, the Commission exercised its discretion in favour of the complainant..."

The Commission also relies on *Shreve v. Corporation of the City of Windsor et al.* (1993), 18 C.H.R.R. D/363 (Ont. Bd. of Inq.) where Professor Kerr, sitting as a board of inquiry, rejected the arguments of the respondents that Section 34(1)(d) was a condition precedent to proceeding with a complaint. There, the board determined that Section 34(1)(d) confers a "broad discretion to the Commission whether to deal with a complaint based on facts more than six months prior to the filing of the complaint."(D/369) Although the board had serious questions as to whether any real consideration had been given to s. 34(d)(1) during the investigation and conciliation stage, he noted that the issue

was raised and therefore would have been part of the file that went to the Commissioners. He found no reason to doubt that it was considered by the Commission according to the normal procedure. "Thus," he concluded, "the ultimate reply was by way of the Commissioner's decision to proceed to a Board of Inquiry." (D/369).

Finally, the Commission contends that any procedural defect, if there is any, may be cured by proceeding to a full hearing and provides no basis to dismiss the complaint. In support of its position the Commission relies on *Harelkin v. University of Regina* (1979), 96 D.L.R. (3d) 14 (S.C.C.*); Re Haber and Medical Advisory Committee of the Wellesley Hospital* (1986), 56 O.R. (2d) 553 (Div. Ct.*); Re Williams and Board of Directors of Kemptville District Hospital* (1986), 55 D.L.R. 633 (H.C.J.)

1. Decision

In my view, a board of inquiry has no general authority under the *Code* to determine if the jurisdictional prerequisites to the establishment of a board of inquiry have been satisfied. That responsibility lies with the courts - either on judicial review or a motion to quash the appointment of the board of inquiry. Instead, it is only when a procedural error or omission, which cannot be rectified, amounts to an abuse of process that a board has the authority to address the matter.

As to a board's general jurisdiction, I agree with the reasoning - for the most part - of dissenting Member Hartman in *Findlay, supra*, that the role of the board is to inquire

into a violation of the *Code*. Member Hartman determined that a board of inquiry was not the proper forum to determine whether the Commission has met its obligations under Section 33 of the *Code*. She explained at p. 5:

> The focus of the board is singularly on the merits of the complaint put before it. Nowhere does the Legislation state or imply that the *Board* is to ensure that the Commission has fulfilled all of its obligations *prior to* the request for a Board.

(emphasis in original). In her view, the remedy for breach of the *Code* by the Commission lies with the courts on judicial review or, in the case of administrative complaint, investigation by the provincial ombudsman under the *Ombudsman Act*. She stated at p. 7: "In other words, the Commission will be held to account for its actions outside of the Board of Inquiry setting; not by ad hoc boards but by the courts and by administrative watchdogs such as the Ombudsman."

The reasoning of Ms. Hartman has been adopted by other boards of inquiry, specifically in *Drummond v. Tempo Paint and Varnish Co.* (unreported, June 21, 1994, Ont. Bd. Inq.) and in *obiter* in *Narraine v. Ford Motor Company of Canada Ltd. et al.* (unreported , April 21, 1994, Ont. Bd. Inq.). In *Drummond, supra*, the board stated at p. 5 that while "performance by the Commission of its duties under the *Code* may be relevant to the issues of abuse of process, or to remedy or costs" there was "no statutory support for the proposition that the jurisdiction of a board of inquiry is dependent on the

Commission's performance of its statutory responsibility prior to requesting appointment of a board."

In my view, the role of a board of inquiry is not, generally, to ensure that the Commission complies with its constituent statute. That is the role of the courts. As the Divisional Court held in *Ontario (Ministry of Health) v. Ontario (Human Rights Commission), supra,* when a statutory tribunal ignores its constituent statue, *judicial* intervention is required. Similarly, in *Bhaduria, supra*, the board ruled at p. D/4505 that s. 34 "enables an aggrieved party to challenge the exercise of [the Commission's] discretion in the Divisional Court where perceived cause exists." I agree.

Clearly, as Respondents urge, an administrative agency must adhere to its governing statute. Also, it is clear that the *Code* appears to require that certain actions take place before a board of inquiry may be established, as the majority in *Findlay, supra*, determined. But the first question is who is to decide if the jurisdictional prerequisites to the appointment of a board have been met - the board itself or the courts. In my view, the answer is the courts. The jurisdiction of a board of inquiry is limited by statute. A board has no general oversight powers. Consequently, even assuming, without deciding, that Sections 33(1) and 34(1)(d) establish conditions precedent to the establishment of a board of inquiry and thus their absence deprives the board of jurisdiction, it is not within the ambit of a board of inquiry to decide that question. It is for the courts as overseers of the administrative process to determine. While it may be that recourse to the courts,

particularly by way of judicial review, may be a remedy of small comfort to a respondent, that practical consideration cannot confer jurisdiction where none exists.

This ruling is not to suggest, however, that the actions of the Commission prior to the appointment of a board of inquiry are completely irrelevant. There may be times when a failure by the Commission so significantly affects the statutory inquiry a board is assigned that continuation of the hearing would amount to an abuse of process and breach fundamental fairness. As the board held in *Shreve, supra* at p. D/366:

> There must be some nexus between an abuse of process at an earlier stage in the proceedings and the availability of a fair hearing before me. Otherwise, it could not be said in any sense by a tribunal that there was an "abuse of its processes." ...
>
> The fact, however, that an abuse of process was engaged in by a separate, and indeed arms-length, body from the Tribunal in question does not preclude the possibility of a nexus between the abuse and the processes of the Tribunal. Similarly, the availability of a fair proceeding by the Tribunal in question does not necessarily mean that all unfairness at the earlier step can be cured. The particular circumstances need to be examined to determine if proceedings by the Tribunal in question will be free of taint from an earlier abuse of process and can cure unfairness that occurred at an earlier step. Thus, it is within my powers to examine the merits of the allegations of unfairness made by the respondent in this case to determine whether, in light thereof, continuation of the proceeding before me would be an abuse of process.

The approach of Professor Kerr in *Shreve* is based on Section 23(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. That provision reads as follows:

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

It is an approach that has been followed by other boards of inquiry. *In Schofield and Suddard v. The Oshawa General Hospital and Benmergui* (unreported, May 1993, Ont. Bd. Inq.), Ms. Deborah Leighton, sitting as a board of inqury, was faced with the failure of the Commission to notify a personal respondent of the complainant's request for reconsideration of its decision not to appoint a board of inquiry as required by Section 36 of the *Code*. In determining the legal effect of that statutory failure, the board analyzed the breach under Section 23 of the *Statutory Powers Procedure Act* as set forth in *Shreve, supra*. The board concluded at p. 9:

> Where a significant breach or error of procedure occurs during the investigation of the complaint or decision to request a board of inquiry, which cannot be rectified, it would be an abuse of process for a board of inquiry to proceed with a full hearing on the merits.

In her view, the statutory failure of the Commission to notify the personal respondent resulted in a breach of fairness, a breach which could not be cured by proceeding with the hearing. Consequently, she ruled that "to go forward now would be an abuse of process contrary to Section 23 of the *Statutory Powers Procedure Act*..." (p. 8)

Although framed in "jurisdictional" language, the majority decisions in *Findlay, supra*, may also be analyzed under the abuse of process framework. In both of the majority decisions, by Members Mikus and Zemans, the board members noted that the Commission's failure to endeavor to effect a settlement prejudiced the rights of the

respondents and could not be cured by proceeding with a lengthy hearing. (Zemans, p. 7; Mikus, p. 21)

Under this analysis, to the extent that a statutory or procedural failure amounts to an abuse of process, a board of inquiry has jurisdiction to deal with the matter under Section 23 of the *Statutory Powers Procedure Act*. Accordingly, it must be determined here whether continuation of the hearing in light of the Commission's actions under Section 34(1)(d) as well as its efforts to "effect a settlement" under Section 33(1) would amount to an abuse of process..

In *Shreve*, *supra*, Professor Kerr considered whether the Commission's actions in relation to Section 34(1)(d) of the *Code* constituted an abuse of process. He found no abuse of process, explaining as follows at p. D/370 :

> [I]f the respondent's powers of persuasion fail to result in such a dismissal, I do not see how this can be seen as an abuse of process, unless there is some evidence that a decision with respect to the exercise of this discretion has been made for an improper purpose.... The matter of dismissal is at the discretion of the Commission, subject only to the right of the complainant to request reconsideration. The process through which the rights of the respondent are to be vindicated in such a case is by way of a hearing before a board of inquiry.

In this case, as well, there is no evidence that the Commission's decision to proceed with the investigation or the appointment of a board of inquiry was made for an improper purpose. If anything, the evidence shows that the Commission exercised its

discretion. It had before it the Case Summary which revealed numerous examples where no determination could be made because there were no records and individuals could not recall events. In addition, the Respondent, in its reply, fully addressed the Section 34(1)(d) issue. Both the Case Summary and the reply were before the Commission when it made its decision to appoint the board of inquiry. Consequently, as in *Shreve, supra,* and *Guthro, supra,* the Commission's exercise of its discretion is evidenced by its decision to request the appointment of a board of inquiry. Without any evidence that the decision was made for improper motives, proceeding to a hearing cannot be deemed an abuse of process.

Nor do I find that proceeding to a hearing in light of the Commission's efforts to effect a settlement in this case would be an abuse of process. Although the Commission's attempt to settle this matter was minimal, at best, the effort was still made. Further, the matter of settlement was left with the Respondents who did not pursue it further and the Repondents were adamant that there had been no discrimination. Therefore, under the specific circumstances of this case, although much more to effectuate a settlement could certainly have been done, the Commission did "endeavor to effect a settlement" as required by Section 33 of the *Code. See, Siung and Agyeman v. Geiger International Ltd. et al.* (unreported, July 6, 1993, Ont. Bd. of Inq.). Consequently, proceeding with the hearing would not constitute an abuse of process.

B. Abuse of Process/ Breach of Duty of Fairness

1. The Combination of Delay and Lack of Particulars

The Respondents contend that dismissal is also required because the combined effect of the extended delay in this case - by the complainant as well as the Commission - and the lack of particulars has so significantly prejudiced its ability to defend itself that continuation of the hearing would be an abuse of process. It submits that these circumstances have rendered it impossible to defend and thus impossible for the Board to fulfill its statutory function. Accordingly, it submits that the complaint must be dismissed and/or permanently stayed on this basis.

The Respondents contend that the board clearly has the authority under Section 23(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 , to dismiss a complaint where to continue would be an abuse of its processes. The pivotal case relied upon by the Respondents is *Shreve v. Corporation of the City of Windsor, supra*, in which Professor Kerr dismissed/permanently stayed a human rights complaint on the basis of fairness. In that case, some of the events on which the complaint was based occurred during the winter of 1985, although the precipitating event took place on May 30, 1986. The complaint was filed on August 13, 1986 and the Respondents were notified approximately two weeks later on August 29, 1986. A fact-finding conference was held on February 20, 1987. The investigation took place between July and September 1987, and conciliation took place on February 9, 1988. The Case Summary was issued on

February 27, 1989. The request for a board of inquiry was made on August 12, 1991 and Professor Kerr was appointed on May 12, 1992.

Professor Kerr determined that the delay in getting to a hearing, even though excessive, was not the test to determine if a complaint should be dismissed or permanently stayed. Rather, he held that "to justify dismissal, delay must result in serious prejudice to the ability of the Respondent to present its case." (D/371) He concluded that while the delay alone did not prejudice the respondent's ability to present a case, the delay combined with a number of other factors - bias of the investigator (which led to questionable reliance by the respondents on the Case Summary) and limited disclosure of witnesses - resulted "in the respondents not receiving reasonable information of the allegations respecting its conduct." (D/374) Because the matter did not proceed promptly, the respondents were deprived of the opportunity to interview witnesses or other persons who might have been able to provide another perspective on the events until memories of the events may have significantly deteriorated. This combination, in his view, "seriously prejudiced the ability of the respondents to prepare their case in a timely fashion." (D/374) He concluded at D/374:

> This violates the principle of fairness. It causes a prejudice that cannot really be cured at the board of inquiry stage since one power a board definitely lacks is that to turn back the clock.

The Respondents argue that the same reasoning applies in this case. It submits that unlike in *Shreve* where the complaint was filed and processed in a timely fashion,

there was an excessive delay in the initial filing of the complaint in this case and that many of the allegations in the complaint are exceedingly vague. It contends that this circumstance was then exacerbated by the Commission's own four year delay in investigating this complaint and its failure to conduct a fact-finding conference, conciliation meeting or any face-to-face meeting which would have enabled the parties to clarify the issues. It contends that at this point in time, late 1994, it still does not know significant particulars and that the combination of all of these factors has seriously prejudiced its ability to mount a defence.

The Respondents also contend that the Commission owed all parties a duty of fairness which was breached in this case, relying *on Commercial Union Assurance et at. v. Ontario Human Rights Commission et al.* (1988), 9 C.H.R.R. D/5140 (Ont. Div. Ct.). It further asserts that the passage of time, alone, has been detrimental to its ability to defend itself in this case. It cites *West End Construction Ltd. and Ministry of Labour for Ontario* (1986), 57 O.R. (2d) 391 (Div. Ct.*); Dominion Management et al. v. Velenosi et al.* (1991) 5 O.R. (3d) 32 (Div. Ct.)(appeal pending*); Ontario (Ministry of Health) v. Ontario (Human Rights Commission)* (1993), 105 D.L.R. (4th) 333 (Ont. Div. Ct.).

In support of its contention that the particulars provided to the Respondents have been insufficient, the Respondents cite *Bhaduria v. The Toronto Board of Education* (1988), 9 C.H.R.R. D/4501 (Ont. Bd. of Inq.)

The Commision, in response, contends that a board of inquiry has no jurisdiction to dismiss a human rights complaint on a preliminary motion, and that it may only dismiss a matter after a hearing on the merits. A dismissal prior to that, it argues, is premature. In support of its position the Commission cites *Ontario College of Art v. Ontario Human Rights Commission* (1993), 11 O.R. (3d) 798 (Ont. Div. Ct.); *R. Francois* (1993) 15 O.R. (3d) 627 (Div. Ct.)

It further argues that the cases which have recognized the power to dismiss on the basis of delay have established a very high standard. It contends that a respondent must establish that the passage of time has rendered it "impossible" to proceed with the board's statutory function, and it submits that the Respondents failed to establish such prejudice in this case. It relies on *Gohm v. Domtar, Inc. et al.* (1989) 10 C.H.R.R. D/5968 (Ont. Bd. of Inq.); *Naraine v. Ford Motor Company of Canada et al.* (unreported, April 21, 1994; Ont. Bd. of Inq.); *Gale v. Miracle Food Mart (No.2)* 1992, 17 C.H.R.R. D/495(Ont. Bd. of Inq.).

The reason behind this high threshold, it points out, is the remedial nature of human rights legislation and the public interest in ensuring the enforcement of human rights laws. *Board of Governors of Senaca College of Applied Arts and Technology v. Bhaduria* (1981), 124 D.L.R. (3d) 193 (S.C.C.).

The Commission asserts that the *Shreve* decision should be limited to its facts and that the instant case is distinguishable. Here, it argues, there has been full disclosure as well as sufficient notice of the allegations to the Respondents from the complaint and Case Summary. This disclosure of information, it argues, is more than sufficient to provide the respondents with procedural fairness. In support of its position it cites *Federation of Women Teachers' Association of Ontario and Ontario Human Rights Commission* (1988), 67 O.R. (2d) 492 (Div. Ct.); *Naraine, supra; Gale, supra*. Any additional information that the Respondents need, it asserts, is within their own knowledge.

Finally, the Commission contends that the Respondents waived its arguments of delay and unfairness by failing to raise them at an earlier point in the process. It submits that the Respondent was content to let the case lie, and that it cannot now complain of the investigation when it failed to cooperate with that investigation. That failure, it submits, is evidenced by the fact that the respondent did not complete the investigatory questionnaire and withheld certain documents, notably a 1990 employment equity survey, from the Commission.

2. Decision

The vast majority of boards of inquiry have taken the view that they have authority to dismiss human rights complaints under s. 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c, S. 22, where the delay renders it an abuse of process to proceed with the hearing. *Gohm v. Domtar Inc. et al, supra; Quereshi v. Central High School of*

Commerce et al. (1987) 9 C.H.R.R. D/4527 (Ont. Bd. of Inq.*); Meissner v. Swiss Chalet et al.* (1989), 11 C.H.R.R. D/94 (Ont. Bd. of Inq.); *Persad v. Sudbury Regional Police Force et al.* (1992), 19 C.H.R.R. D/ 334 (Ont. Bd. of Inq.*); Baptiste v. Napanee and District Rod and Gun Club* (1993), 19 C.H.R.R. D/246 (Ont. Bd. of Inq.); *Munsch v. York Condominium Corp. No. 60 et al.* (1992) 18 C.H.R.R. D/339 (Ont. Bd. of Inq.). *But see, Lampman v. Photoflair Ltd. et al.* (1992), 18 C.H.R.R. D/196 (Ont. Bd. of Inq.).

As noted previously, Section 23(1) of the *Statutory Powers Procedure Act* provides as follows:

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

The jurisprudence further indicates two bases for dismissal due to delay: (1) the delay must make the statutory inquiry impossible, or (2) the delay must prejudice a party in its ability to present a defence and therefore result in an abuse of process. *See, e.g., Thorne v. Emerson Electric Canada Ltd.* (1993), 18 C.H.R.R. D/510 (Ont. Bd. of Inq.); *Munsch, supra.* .

The first branch emanates from the decision of Professor McCamus in *Hyman v. Southam Murry Printing (No. 1)* 1982, 3 C.H.R.R. D/617 (Ont. Bd. Inq.) where Professor McCamus ruled that there should be no dismissal of human rights complaints on the basis of delay unless the passage of time has made fulfillment of the board's statutory task

"impossible." This would only arise, in his view, where "the facts cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the *Code* has occurred." (D/621)

The second branch is best explained in *Guthro, supra*, where the board articulated the following standard at p. D/391:

> The prejudice to a party occasioned by delay must indicate more than inconvenience; it must be sufficiently oppressive to prevent a response or defence from being made. An unreasonable delay creates an insurmountable problem: a key witness has died, documentary evidence has been destroyed, or some other circumstance has limited the opportunity to defend against the allegations in the complaint.

Accord, Shreve, supra.

Under either branch, however, the jurisdiction to dismiss for delay must be "sparingly exercised." *Gohm v. Domtar Inc. et al., supra* at D/5970. The rationale behind the reluctance of boards of inquiry to dismiss stems from the importance of human rights legislation to the individual complainant and society at large. A dismissal leaves a complainant without a remedy, which is particularly unfair when the delay is not caused by the complainant but the administrative processes of the Human Rights Commission over which the complainant has no control. *See, e.g. Hyman, supra ; Narraine, supra.*

The reluctance of boards to dismiss is demonstrated by the fact that there is only one reported decision where a board has dismissed a complaint on the basis of delay,

Shreve v. Corporation of the City of Windsor, supra, although the courts appear to be somewhat more sympathetic. *See, West End Construction Ltd. and Ministry of Labour for Ontario, supra,* at pp. 401-402 (noting that evidentiary problems increase with the passage of time); *Ontario (Ministry of Health), supra*, (noting there was a delay of 7 to 9 years after the events took place, and concluding that "it is doubtful whether any tribunal can safely rely on memories of witnesses as to events that happened so long ago, particularly when the significance of some of the events may depend on nuances in speech, attitudes or behaviour."). *But see, Hall and Ontario (Human Rights Commission) v. A-1 Auto Collission and Auto Service and Latif* (unreported, Nov. 29, 1994, Ont. Div. Ct.). Thus, while the courts have recognized that time erodes memories, boards have rejected any notion of presumptive prejudice based strictly on the passage of time. The board in *Gohm v. Domtar, supra*, for example, rejected the view that the passage of time, as a matter of law, must be presumed to harm interests. Instead, there must be *actual* prejudice. *Guthro, supra,* at D/391. Where there is no showing of actual, as opposed to potential, prejudice, boards have not granted motions to dismiss.

Not only must prejudice be established, but the harm must also not be curable. It is true that, in some cases, where an administrative proceeding involves a series of steps, a violation of fairness at an earlier step may be cured by the opportunity of a full hearing at a later stage. *Harelkin v. University of Regina, supra; Re Haber and Medical Advisory Commission of the Wellesly Hospital, supra*. But that is not always the case. As determined in *Shreve,* there may well be a nexus between an abuse of process at an earlier

stage and the processes of a board of inquiry. Where the unfairness can be rectified in the hearing process, there is no basis to dismiss. Where it cannot be corrected, however, continuation of the hearing may amount to an abuse of process.

The second line of cases noted above is based on Section 23 of the *Statutory Powers Procedure Act* and involves the right to a fair hearing - a basic tenet of natural justice and administrative fairness. As the Court of Appeal in Manitoba explained in *Nisbett v. The Manitoba Human Rights Commission et al.*, unreported at p. 16:

> It cannot now be doubted that the principles of natural justice and the duty of fairness which are part of any administrative civil proceeding includes the right to a fair hearing, and that delay in the performance of a legal duty may amount to an abuse that the law will remedy: see Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988) at p. 439.

The question in the present case is whether the delay in the filing of the complaint, the delay in the processing of the complaint, the lack of any face-to-face meeting and the lack of particulars combine to prevent a fair hearing. This, in turn, depends on whether the combination of circumstances in this case " prevent a response or defence from being made." *Guthro, supra* at D/391. Or, as stated in *Shreve*, whether it has resulted in "serious prejudice to the ability of the respondent to present its case." (D/371). If so, continuation of the hearing would be an abuse of process.

In *Shreve*, the combination of delay, bias on the part of the investigator and limited disclosure of witnesses was held to have seriously prejudiced the ability of the respondents

to prepare their case in a timely fashion. The respondents were "left in the dark for years" without the opportunity to try to interview witnesses or others until memories of the events may have significantly deteriorated because of the passage of time. In the board's view, this combination violated the principle of fairness, a violation which could not be cured by proceeding to a hearing since a board did not have the power "to turn back the clock." (D/374)

Consequently, under *Shreve*, the ability of a respondent to know in a timely fashion the case it must meet is crucial to a fair hearing. Although it is clear that a respondent has an obligation to secure and retain evidence, it must first know the case to meet.

It must therefore be determined, in this case, if the respondents knew the case it had to meet. Here the timing of the complaint in relation to the events alleged to have been discriminatory, the timing of the investigation and the processing of the investigation become significant. In addition, the sufficiency of the particulars in the complaint are important. With sufficient particulars, a respondent may prepare a defence when it receives notice of the complaint.

The requirement that a respondent know the allegations it faces stems from Section 8 of the *Statutory Powers Procedure Act*, which , in turn, codifies principles of fundamental fairness. That section provides as follows:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

The leading case which discusses the meaning of Section 8 is *Dubajic et al. v. Walbar Machine Produces of Canada Ltd.* (1980), 1 C.H.R.R. D/228 (Ont. Bd. Inq.). In that case, Mr. Gorsky, sitting as a board of inquiry, determined that the purpose of Section 8 "is to define the issues and thereby prevent surprise by enabling the party against whom the allegations are made to prepare for the hearing." (D/229). He continued at D/229:

> At the very least, s. 8 of the Act in order to fulfill this purpose would require that Walbar be furnished with a written statement of the material facts upon which the Commission intends to rely in support of the allegations with respect to the issues involving Walbar's good character or propriety of its conduct. Such material facts should include when and where the alleged acts, which raised the issues, occurred, as well as the names of such persons who are referred to in the allegations, subject to the exceptions noted above.

The "exceptions noted above" refer to an earlier determination regarding the disclosure of persons unnamed but referred to in the complaint. The board ruled that the identity of such persons would be ordered if they formed a substantial part of the facts material to the issues and were reasonably necessary for Walbar to have sufficient information about the allegations so as to enable it to prepare to meet them. (D/229)

The board also ordered the Commission to specify the "instances" of alleged discrimination and the acts relating to those instances. He explained at D/232:

> It is important for Walbar to be able to concentrate its efforts on the particular incidents raised in the complaint. Vague, generalized claims, which make it difficult to identify the real issue should be made sufficiently specific if the element of surprise is to be reduced.

The *Dubajic* case was relied upon by the board in *Bhaduria v. The Toronto Board of Education*, *supra*, which raises a number of allegations that are very similar to some of the allegations in the present case. That case involved a claim, filed in 1983, that the respondent board of education had discriminated against the complainant since 1981 by denying his 41 applications for a promotion to vice-principal. The original complaint was amended several times and the claims were further particularized by letters from Commission counsel in response to the respondent's request for particulars. At the outset of the hearing, the respondent sought further particulars. While the Board determined that the correspondence generally satisfied the requirement to supply "reasonable information" under Section 8 of the *Statutory Powers Procedure Act*, there were two areas where further information was required. First, the Commission was ordered to supply the respondent with the names of all of the schools and dates where the Commission intended to allege discrimination in the process of applying for promotion. (D/4503) Second, the criteria used in the selection process alleged to be discriminatory had to be specified. The board stated at p. D/4503:

> Secondly, paragraph 3(b) of the June 10th letter of Mr. Anand (Appendix 3) cannot be accepted as satisfying section 8 of the Statutory Powers Procedure Act. Paragraph 3(b) reads:

> Criteria used to assess persons during interviews are developed in a manner that permits the use of requirements that are insufficiently related to the work required and which adversely affect persons of South Asian origin. Such criteria *include*:
> - "warmth and openness";
> - "sense of humour" and "gentleness";
> - "articulateness" and "giving replies in depth";
> -involvement in the life of a school [Emphasis added]
>
> If the Commission intends to allege that certain "criteria" are improperly utilized in the assessment process, it is not sufficient to present a partial list to the respondent and leave open the chance to add other criteria by using the words "include" at the head of the list. The respondent is entitled to notice of the allegedly offensive criteria prior to the hearing. This falls squarely within the requirement of having to provide reasonable information of the allegations.

See also, Federation of Women Teachers' Association of Ontario and Ontario Human Rights Commission, *supra*, at p. 504-505 (investigative body must give respondent the "substance of the case against it", a "fair summary of the relevant evidence.")

In the instant case, the lack of particulars is far more glaring. Paragraph 17 of the complaint states as follows:

> 17. I further allege that the practise and procedures related to hiring, promotion and upgrading within the University of Toronto Library system have had the effect of screening out blacks, especially those seeking promotion contrary to section 10 of the *Human Rights Code*, 1981, Statutes of Ontario 1981.

There has been no supplemental clarification of the allegedly discriminatory criteria, practices or procedures as required by Section 8 of the *Statutory Powers Procedure Act*.

Yet, specification of the allegedly discriminatory practises and procedures is essential. It is basic information needed to prepare the respondents' defence.

Similarly, there are several other allegations in the complaint which are vague and general . Paragraph 5 reads as follows:

> 5. During the next few years [presumably, 1980-1983], I continued to apply for promotions. Since all of my applications were rejected, I began to apply for upgrading in order to bring my pay in line with my diverse duties. These applications were also denied.

There has been no identification of the promotions referred to - how many, which job postings, or when they occurred. Nor is there any indication of the applications for upgrading - how many, for what, when the applications were made or to whom.

> Paragraph 9 of the complaint reads as follows:
>
> 9. Because of these and similar incidents, 1983-1985, I began to carefully document every incident and began keeping copies of all applications and relevant letters. I did so because of my increasing suspicion that my lack of promotion and upgrading was a result of my race and/or colour. I was led to this conclusion because:
>
> A. to the best of my knowledge I was the first black to be employed full-time in the Science and Medicine Library as a result of competition
>
> B. of my awareness of the harassment and ill treatment of other black employees in the Library system
>
> C. my observation and knowledge of the library indicated that black persons held menial or low paying positions despite their qualifications and work experience, in other words, the lower down you go, the blacker the workforce gets.

There is no specification of the "similar incidents" referred to, there is no specification of the alleged "harassment and ill treatment of other black employees", there is no specification of blacks who held menial jobs "despite their qualifications and work experience". All of this information is needed to meet this claim.

Paragraph 11 is equally deficient. It reads:

> 11. After my transfer to the Science and Medicine Library, similar incidents of harassment continued at the hands of John Valinska, my new work supervisor. Events took place in the presence of many witnesses.

There is no indication of any specific incident of harassment - what happened, when did it happen, where did it happen, who was involved. These are material facts needed to prepare a defence.

Paragraph 14 is also deficient. It reads:

> 14. From my personal experience and observation of the University of Toronto Library system, it appears to me that the University does not object to employing black persons in low level positions. However, the University is not willing to promote such employees. If a black employee does apply for upgrading, promotion or merely stands up for his/her rights, library personnel use harassment and intimidation to frustrate and dissuade them and to keep them in their "place." For someone with my qualifications and experience such discriminatory treatment is especially demoralizing.

This is an exceedingly vague assertion that the University is not willing to promote black employees and when black employees apply for upgrading, promotion or assert their

rights, "library personnel" use harassment and intimidation to stop them. There are no specifics at all.

No specifics were added by the Case Summary, nor were any further particulars provided by the Commission. The disclosure provided to the respondents in May 1994 does not, in my view, change or correct this situation. Not only is there a question of the timeliness of that disclosure, which will be addressed below, but disclosure is not a substitute for particulars. It leaves the respondent to guess and speculate about what, in the volumes of information and documents presented, will be included in the Commission's case. While particulars need not be "elegant" in form, as the board held in *Bhaduria, supra* at D/4503, it is not enough to hand a respondent a file and say you guess what in this mass of information we will be alleging. The responsibility to provide the respondent with "reasonable information" to prepare its case lies with the Commission and the complainant.

I find the cases cited by the Commission which did not order further particulars distinguishable. In *Gale v. Miracle Food Mart (No.2)* (1992), 17 C.H.R.R. D/495 (Ont. Bd. of Inq), *reversed on other grounds* (1993), 18 C.H.R.R. D/97 (Ont. Div. Ct.) as well as *Narraine, supra*, the need for additional particulars was not found warranted because the particulars already provided reasonably defined the issues and enabled the respondent to prepare for the hearing. That is simply not the case here in relation to paragraphs 5, 9,11, 14 and 17.

Consequently, it is clear that a number of the allegations in the complaint are lacking in particulars. It is also clear that I have the authority to order further particulars. The question, therefore, is whether, at this point in time, an order for additional particulars would enable the respondent to meet the case against it or whether, because of the passage of so much time, the respondents' ability to defend has been significantly prejudiced, thereby precluding a fair hearing on those issues. If so it would be an abuse of process to continue the hearing as to those claims.

In my view, what an order for particulars now, at the very end of 1994 (1995 by the time the particulars would be provided) would involve is for the respondent to ask individuals about promotions and upgrading applications made between 15 and 13 years ago (paragraph 5), about alleged incidents of harassment and ill treatment from 12 to 10 years ago (paragraph 9(B)), about why individuals were awarded certain jobs "despite their qualifications and experience" from 12 to 10 years ago (paragraph 9(C)), about "incidents of harassment" from 9 to 8 years ago (paragraph 11), about harassment and intimidation from 15 to 8 years ago (paragraph 14) and hiring decisions, promotion decisions and upgrading decisions from 1980 forward (paragraph 17). The record evidence shows that there are 20 to 30 job postings a year. The number of hiring decisions or upgrading requests is not in the record. But based on promotion decisions alone, there would be between 160 to 240 decisions from 1980 to 1988, and an additional 120 to 180 from 1988 to the present, assuming that this period of time is relevant, as the

Commission asserts. In the absence of documentation concerning who applied for the positions and their background, who did the interviews and their interview notes, all of this information would depend on memory.

Similarly, claims of harassment and ill-treatment, even if now specified, will be dependent on memory. As the board in *Shreve* stated at p. D/371:

> The importance of the memory of witnesses would also depend on the nature of the case. Where events have been recorded, or the case otherwise depends heavily on documentary evidence, the memory of witnesses may be of relatively little importance. On the other hand, if the case turns on events which are not recorded, the memory of witnesses would be extremely important.

It is in this regard that the failure of the complainant to have timely filed his complaint, or even grieve the promotions he claims he was improperly denied, becomes problematic. Years passed with no reason for the respondent to suspect its decisions or actions would be challenged. Consequently, records were not retained and recollections of events were not recorded. Then, years after the events alleged to be discriminatory took place, a complaint is filed. This, in my view, is actual prejudice which detrimentally affects the respondents' ability to defend against the complainant's charges.

In fact, a significant portion of the delay is attributable to the complainant. The complaint itself shows that Mr. Joe suspected he had been denied promotions because of his race and colour as early as 1980. Between 1983 and 1985, he became "increasingly

suspicious" that he had repeatedly been denied promotions and upgrading because of his race and colour and so he "began to carefully document every incident and began keeping copies of all applications and relevant letters. ...." Consequently, by 1985, if not before, the complainant was aware of a pattern of denial of promotions, alleged harassment and ill treatment against himself and other blacks. But he filed no complaint. He waited three more years to do so. Further, there is no precipitating event which led to his complaint. While some time leeway should be given in a pattern and practice case (in order to discover and learn there is, in fact, a pattern developing), here, the complainant was well aware of an alleged pattern and well aware of his rights by 1985.

It is also significant, in my view, that the respondent's March 1989 request for further particulars was ignored by the Commission. While the respondent's request could certainly have been far more specific, the request was nonetheless made and ignored.

This situation was then exacerbated by the four year delay by the Commission in investigating this case and the absence of a fact-finding conference or any other face-to-face meeting where the issues and particulars could have been more fully explored. Clearly, there is no requirement in the *Code* or the Commission's procedure manual for fact-finding. In most cases, where the complaint is more properly drafted, this would cause no problem since the respondent would know the case it had to meet and take steps to preserve evidence and record recollections. But where, as here, the complaint is so vague and deficient in significant areas, the absence of a fact-finding conference or other

face-to-face meeting deprived the respondent of an opportunity to get specifics at an early date and therefore to prepare a defence in a timely way.

Without question, a respondent has an obligation, upon receipt of a complaint, to take steps to preserve evidence and record recollections. *Shreve, supra* at D/371; *Munsch, supra* at D/340. The respondent did so in this case. But that obligation can only be meaningful when the allegations are known. Where the allegations are vague and unclear, a respondent cannot investigate or prepare a defence.

In contrast, where a claim is promptly filed and promptly investigated, the recollections may be recorded while events are relatively fresh in people's minds and documents may be preserved. Then, if there is a delay in the appointment of a board of inquiry, the memories and documents are preserved and can be refreshed and the prejudice, barring the death of a key witness, would be minimal.

In this case, however, the Complainant's delay was exacerbated by the Commission's delay. The Commission's investigation did not commence until late 1992 and by then, the events complained of in this matter were very stale indeed. At that point, the only one with contemporaneous notes and records was the complainant. This puts the Respondents at a severe and unfair disadvantage in preparing a defence.

In so ruling, I note that the record does not support the Commission's contention that the respondent waived its right to contest the Commission's actions or that the respondent failed to cooperate in the investigation. There was no requirement that the respondent complete the questionnaire and there is no evidence that the respondent did not fully co-operate in the investigation once the investigation finally got underway. The Respondents decision not to produce the 1990 employment equity report does not, by itself, amount to a failure to co-operate with the investigation.

Consequently, I conclude that the standard set forth in *Guthro, supra, Shreve, supra* and *Nisbett, supra*, has been met in this case. There is far more than "mere inconvenience" here. The combination of delay by the complainant, delay by the Commission, and lack of particulars is "sufficiently oppressive to prevent a response or defence from being made" to a number of allegations in the complaint. Documentary evidence was not retained and the circumstances have "limited the opportunity to defend against the allegations in the complaint." *Guthro, supra* at D/391. As in *Shreve*, the combination of the particular circumstances of this case cannot be cured by an order of further particulars now. As in *Shreve*, a board of inquiry does not have the power to turn back the clock.

Accordingly, I conclude that the combination of delay by the complainant, the lack of particulars and the subsequent passage of so much time, has seriously prejudiced the respondent's ability to defend itself which cannot be cured by an order for additional

particulars at this time. Consequently, to allow the hearing to proceed on the allegations that are vague would be an abuse of process. Therefore, paragraphs 5, 9, 11, 14 and 17 are hereby stricken from the complaint.

The remaining paragraphs of the complaint are sufficiently clear and specific to proceed upon. Because the allegations are specific, the respondent was or should have been able to question its supervisors and employees in 1989 and record their recollections. Consequently, it may be possible for their memories to be refreshed. Therefore, as to the remaining allegations, there has been insufficient proof of actual prejudice to warrant dismissal at this time. As the hearing unfolds, if such proof is provided, the respondent may renew its motion.

Accordingly, paragraphs 5, 9,11, 14, and 17 of the complaint are stricken. The complaint will proceed on the remaining allegations.

III. The Commission's Motion to Amend the Complaint

The Commission seeks to amend the complaint in this matter to add the following allegations:

> 18. During 1991, and after I filed my complaint with the Human Rights Commission, I received a series of communications directed at me via the computer data base in the library. The communications consisted of racist slurs and other derogatory language. These comments have had a profound negative impact on my self esteem and dignity and I became fearful of my safety. These comments poisoned the work environment for me and other racial minorities.

19. I believe that these comments were directed at me because of my race and colour and because, as a union steward and a member of the human rights committee in the workplace, I assisted other members of disadvantaged groups in bringing forward complaints of discrimination to management.

20. I also rely on section 8 (or 7, 1981) of the *Code*.

The Commission contends that a board of inquiry has the authority to amend the complaint and that it would be appropriate for the board to do so in this case. It contends that the touchstones of natural justice are adequate notice and an opportunity to respond, both of which, it asserts, were provided to the Respondents.

The Commission argues that the issue of the racist slurs on the computer was raised with the Respondents in 1991 by Human Rights Officer Pangilinan and that the matter was also extensively raised during the investigation by Officer Sutton, as reflected in the Case Summary. It submits that the University, at the time, undertook an investigation of the matter and thus had notice, an opportunity to respond and will be fully able to respond to the new allegations.

In support of its motion, the Commission relies on the following cases: *Emcon Services Inc. v. British Columbia Council of Human Rights* (1991), 49 Admin. L. R. 220 (B.C.S.C.); *Pattison v. Fort Frances (Town) Commissioners of Police*(1987), 8 C.H.R.R. D/3384 (Ont. Bd. of Inq.); *Barnard v. Fort Frances Board of Police Commissioners* (1986), 7 C.H.R.R. D/3167 (Ont. Bd. of Inq.); *Tabar and Lee v. Scott and West End Construction Ltd.* (1982), 3 C.H.R.R. D/1073 (Ont. Bd. of Inq.); *Cousens v. Canadian*

Nurses Association (1981), 2 C.H.R.R. D/365 (Ont. Bd. of Inq.); *Wong v. Ottawa Board of Education and Wotherspoon* (unreported, October 18, 1993, Ont. Bd. of Inq.); *Hyrciuk v. Ontario (Lt. Governor)*(1994), 18 O.R. (3d) 695 (Div. Ct.)

The Respondents contend that a board has no authority to amend the complaint since to do so would bypass the administrative processes built into the Human Rights Code - the investigation, conciliation and attempted settlement of the claim. It submits that the Commission should not be allowed to bypass these important procedures.

The Respondents further argue that even if a board has the jurisdiction to amend the complaint, the Commission could have and should have done so earlier and should not be allowed to amend the complaint at this late date. In support of its position the Respondents cite *Local 916, Energy and Chemical Workers v. Atomic Energy of Canada Ltd. (Candu Operations)* (1984), 5 C.H.R.R. 2066.

1. Decision

The motion to amend the complaint is allowed. The jurisprudence under the Ontario *Human Rights Code* is clear that a board of inquiry has the power to amend the complaint, not only to add additional grounds but additional facts as well, provided the requirements of natural justice are met. *Barnard v. Fort Frances Board of Police Commissioners, supra; Cousens v. Canadian Nurses Association, supra; Tabar and Lee v. Scott and West End Construction Ltd., supra.* Amendments have been permitted even

where there was no reason why the amendment "could not have been filed *well in advance of the hearing on [the] matter.*" *Pattison v. Fort Frances (Town) Commissioners of Police, supra* at D/3894 (emphasis in original).

As long as there is adequate notice, no prejudice and an opportunity to respond, the requirements of natural justice are satisfied and the amendment may be allowed. In this case, the issue of the computer epithets directed at the Complainant was brought in a timely way to the Respondents' attention by the Commission and were covered, at some length, during the investigation and Case Summary. The Respondents had an opportunity to reply to the Case Summary. Consequently, the Respondents had notice that this was a subject of concern to the Commission and an opportunity to reply. An investigation was undertaken at the time by the Respondents and, therefore, there would be no prejudice to the Respondents if the amendments are allowed. While the Commission clearly should have moved to amend the complaint much earlier than it did, the amendment is properly founded.

Accordingly, the motion to amend the complaint to add paragraphs 18, 19 and 20 is allowed.

IV. The Respondents' Motion to Quash the Summons

The Respondents seek to quash the summons sought by the Commission as it pertains to the following items:

1. A copy of the 1990 Report to the President on Racial Minorities and Ethnocultural Groups at the University of Toronto which was tabled in December 1990;

2. All notes, records and reports made in relation to the University of Toronto Police Investigation into the promulgation of racist and sexual epithets circulated to Hollis Joe via the University's T-Series 50 on-line data base beginning in 1991, including all records of the police investigation as well as any other records maintained by any university authority (employee or otherwise);

3. The identity of the individuals to whom university officials spoke regarding the authoring of the epithets;

4. The identity of all university personnel who have knowledge of the alleged perpetrators of the epithets;

5. The identity, background and experience of the university person who concluded that [the] author of the racist and sexual epithets could not be identified through the university data base;

6. All records related to the Employment Equity Workforce Survey conducted at the University of Toronto: Including the preparatory material for the survey, the survey, the initial results of the survey and the corresponding stock and flow data; and

7. Corresponding wage rates for the data found in the survey (if not already provided in the survey data).

Respondents submit that the statutory basis upon which a summons may be issued is Section 12(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, which provides as follows:

> 12(1) A tribunal may require any person, including a party, by summons,
> (a) to give evidence on oath or affirmation at a hearing; and
> (b) to produce in evidence at a hearing documents and things specified by the tribunal,
> relevant to the subject-matter of the proceeding and admissible at a hearing.

The Respondents submit that under this provision, documents may only be produced "at a hearing", through a witness, and that it does not allow for production prior to the hearing. Consequently, the Respondents contend that the summons, at this point, is premature.

In support of its position the Respondents rely on *Johnson v. East York Board of Education et al.* (1988), 9 C.H.R.R. D/4791 (Ont. Bd. of Inq.), in which Chairman Hovius, sitting as a board of inquiry, distinguished between a preliminary hearing and a hearing on the merits and determined that Section 12(1) of the *Statutory Powers Procedure Act* did not allow a board to order the production of documents prior to a hearing on the merits. In his view, the summons power was "akin to the issuance of a *subpoena duces tecum* by which a witness is compelled to attend the hearing and produce documents into evidence." (D/4792) Since the hearing on the merits had not yet commenced, he found the summons to be untimely. He stated: "If [the Respondent] were required to produce the documents at a preliminary hearing so that they can be studied by the Commission, it would not be produced 'in evidence at the hearing' as dictated by section 12(1)." (D/4792) Instead, the Commission was free "to obtain a new summons requiring the respondent to give evidence at the hearing on the merits and to produce in evidence at that hearing documents relevant to the subject-matter of the proceedings and admissible at the hearing."(D/4793) While the board recognized that this might well

result in the need for an adjournment, he still concluded that he had "no power to order production of the documents in advance of the hearing on the merits." (D/4793)

The Board in *Johnson* relied on the decisions in *Salamon v. Searchers Paralegal Services et al.* (1987), 8 C.H.R.R. D/4162 (Ont. Bd. of Inq.) and *Ryckman v. Board of Commissioners of Police of the Town of Kenora* (1987), 8 C.H.R.R. D/4138 (Ont. Bd. of Inq.), both of which were also cited by the Respondents. In *Salamon*, Professor Cummings, sitting as a board of inquiry, held that a board was not empowered to compel the production of documents "prior to a hearing" and that the proper course was for the Commission, "[a]fter the hearing has begun ... [to] call the person subject to the *subpoena duces tecum* as a witness to produce the documents." (D/4139) This was true even though the "hearing" had already begun by way of a conference call.

In *Salamon*, Chairman Zemans, sitting as a board of inquiry, determined that the respondents were not entitled to compel the production of evidence at a "preliminary hearing" under Section 12(1) of the *Statutory Powers Procedure Act*. Rather, the board determined that "Section 12(1)(a) clearly states that the party summoned is to give evidence at a hearing and further that any documents to be produced under this section are to be produced 'in evidence at a hearing.'"(D/4164) In that case, there already had been a number of days of hearing on preliminary matters.

The Respondents further rely on *Youmans v. Lily Cups Inc. et al.* (1990), 13 C.H.R.R. D/395 (Ont. Bd. Of Inq.). In that case, at a "preliminary hearing", the Commission requested the production of certain documents. Relying on the *Ryckman* decision, Chairman Plaut, sitting as a board of inquiry, determined that the Commission should "wait until testimony is called and then proceed to ask for a *subpoena duces tecum*, in accordance with the cited provisions of the SPPA." (D/396)

The Respondents further contend that under Section 12(1), a witness must be present at the hearing, although at the outset of the hearing on September 20, 1994, counsel had agreed that the witness could be produced "notionally".

The Respondents further argue that item numbers 1,6, and 7, which relate to the employment equity survey and supporting documentation should not be ordered produced on the basis of confidentiality. It cites *Slavutych v. Baker et al.* (1975), 55 D.L.R. (3d) 224 (S.C.C.) where the Supreme Court of Canada endorsed a four-part test to determine if a document should be barred as privileged. The Respondents assert that the employment equity surveys and supporting documentation meet this test. Respondents also assert that the information is not relevant since the survey was done in 1990, two years after the complaint was filed.

Accordingly, the Respondents request that the motion to quash the summons be granted.

The Commission argues that its summons was properly requested at this point in time since there is only one hearing in this matter which commenced with the conference call on April 5, 1994. It submits that there is no valid distinction between a "preliminary" hearing and a hearing "on the merits" in human rights proceedings and the cases which have so held have been wrongly decided. It further submits that such an interpretation would lead to an absurd result in that a board would then have no authority to compel the attendance of witnesses or documents at a "preliminary" hearing. In support of its position the Commission cites *Olarte et al v. DeFelippis et al.* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. of Inq.) which, in turn, quotes a passage from *Ahluwalia v. Metropolitan Toronto Board of Police Commissioners* (1980), 27 O.R.(2d) 48 at p.49 (Div. Ct.) which noted that the board was "granted an adjournment and the right of access to and examination of such records before the inquiry proceeded." The Commission also cites *McMinn et al. v. Sault Ste. Marie Firefighters Association* (1986), 7 C.H.R.R. D/3458 (Ont. Bd. of Inq.)

The Commission further contends that its requests are specific, clear and relevant to the issues in the case, particularly the allegations of systemic discrimination. *Olarte v. DeFilippis, supra; Gohm v. Domtar Inc. (No. 3)et al.* (1989), 11 C.H.R.R. D/420 (Ont. Bd. of Inq.). It submits that any confidentiality concerns that the respondents have could be addressed by receiving the documents *in camera*. In support of its position, the Commission relies on *Ahluwalia*, *supra*. Nor, in its view, must a witness be called.

Dudnik v. York Condominium Corp. No. 215 (No. 2) et al. (1990), 12 C.H.R.R. D/325 (Ont. Bd. of Inq.) Accordingly, it requests that the motion to quash be denied.

1. Decision

The case law presented by the Respondents clearly indicates that the summons requested by the Commission is premature at this point in time. *Johnson v. East York Board of Education, supra; Salamon v. Searchers Paralegal Services, supra; Ryckman v. Board of Commissioners of Police of the Town of Kenora, supra; Youmans v. Lily Cups Inc, supra.* Although I agree with counsel for the Commission that there is only one "hearing" which, in this case, began with the conference call on April 5, 1994, that still does not mean that the summons for the production of documents is timely now.

None of the cases cited by the Commission indicate that documents may be ordered produced prior to the time that the evidentiary hearing on the merits is underway. The quoted portion of the *Ahluwalia* decision cited in *Olarte, supra*, is unclear. It may mean that production was ordered before the hearing commenced or it could mean that an adjournment was ordered and production allowed "before the inquiry proceeded" again. In fact, the latter interpretation appears to be more likely. Further, there is nothing in *McMinn, supra*, that indicates that a summons to produce documents would be appropriate at this time.

In *Gohm v. Domtar Inc. (No. 3) et al., supra*, which was also cited by the Commission, the summons was treated as a *subpoena duces tecum*, and even though that meant a possible "cat and mouse" game, the board held that such a result was inevitable in the absence of "pre-hearing" discovery. In that case, moreover, the dispute over documents occurred seven days into the hearing. Likewise, in *Dudnik v. York Condominium Corp. No. 216 (No. 2) et al., supra*, the request for documents was "made after the hearing was well underway."

Consequently, I find the decisions cited by the Respondents, and the reasoning expressed in them, to be persuasive. While this will undoubtedly lead to a new request by the Commission and the "cat and mouse" game deplored in *Gohm v. Domtar Inc., supra*, I find that I am limited by the language of Section 12(1) of the *Statutory Powers Procedure Act* and that production of documents may only be ordered for production "in evidence at a hearing." If that means that an adjournment is required, an adjournment will be granted, which I note, will only further delay this hearing. That is why it is often suggested that a party *voluntarily* produce the requested documents.

While this conclusion is lamentable on the basis that it may lead to further delay, the distinction made in the cases between a "preliminary" hearing and a hearing "on the merits" does not lead to the absurd result postulated by the Commission. If there are witnesses or documents that are relevant to the motions at issue during a "preliminary" hearing, Section 12(1) would allow a summons to be issued at that time. What is

important under Section 12(1), as interpreted by the jurisprudence, is the timing of the summons - it must be when the evidence is to be produced at the hearing, not beforehand. Production beforehand has been viewed as a form of pre-hearing discovery for which there is no authority under the *Statutory Powers Procedure Act*.

Accordingly, I find that the motion to quash the summons is well founded.

In terms of the parties' remaining arguments, my ruling above makes it unnecessary to decide them. However, in anticipation of a renewed summons request by the Commission, I will briefly mention my views.

It appears that any confidentiality concerns about items # 1, 6 and 7 could be addressed through receiving the documents *in camera*, but I have some doubt as to the relevance of those documents in light of my ruling to strike paragraphs 5, 9, 11, 14 and 17 of the complaint. The parties argued relevancy based on the original complaint. Consequently, I will hear any arguments the parties may wish to make on that issue at the appropriate time.

V. Conclusion and Order

Based on all of the foregoing reasons, I conclude and **ORDER** as follows:

1. The Respondents' motion to dismiss is granted in part and denied in part. Paragraphs 5, 9, 11, 14 and 17 of the complaint are hereby stricken from the complaint.

2. The Commision's motion to amend the complaint is granted..

3. The Respondents' motion to quash the summons is granted.

Randi H Abramsky

Randi Hammer Abramsky, Chair, Board of Inquiry

Dated: January 3, 1995